Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1979 Term

No. 79-924

ARLIE B. THOMPSON, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Decision Below	1
Jurisdiction	2
Questions Presented for Review	2– 3
Provisions of Federal Rules of Evidence Involved	3– 4
Statement of the Case	4–10
(A) Proceedings	4– 5
(B) Statement of Facts	5–10
Reasons for Granting the Writ	10–18
I. The decision of the United States Court of Appeals for the Sixth Circuit that the communication of the Court to the jury that the court had made a finding that there existed a prima facie showing of the existence of a conspiracy between the defendant and his co-defendant was not prejudicial to the defendant raises *serious* and important questions of federal constitutional law that has not been and should be decided by this court	10–15
II. The holding of the United States Court of Appeals for the Sixth Circuit that in determining, pursuant to Fed. R. Evid. 104(a), whether the factual basis has been established for admission of a co-conspirator's out-of-court statement against the defendant pursuant to Fed. R. Evid. 801(d)(2)(E) the trial court may consider as evidence the hearsay statements themselves, is in direct conflict with the decisions of other courts of Appeals on the same matter, and is in direct conflict with prior decisions of this court	15–18
Conclusion	18
Appendix	19–30
Order of the Court of Appeals	19–29
Order Denying Petition for Rehearing	30

AUTHORITIES CITED

Cases: PAGE

Glasser v. *United States*, 315 U. S. 60 (1942) 16, 17
United States v. *Bell*, 573 F. 2d 1040 (8th Cir. 1978) 14
United States v. *Enright*, 579 F. 2d 980 (6th Cir. 1978) 11, 14
United States v. *James*, 590 F. 2d 575 (5th Cir. 1979) 13–14, 16, 17
United States v. *Martorano*, 557 F. 2d 1 (1st Cir. 1977) 14, 17
United States v. *Nixon*, 418 U. S. 683 (1974) 16, 17
United States v. *Petrozziello*, 548 F. 2d 20 (1st Cir. 1977) 14, 17
United States v. *Santiago*, 582 F. 2d 1128 (7th Cir. 1978) 14

Statutes:

18 USC 1951 ..... 4, 5
18 USC 1952 ..... 4, 5
28 USC 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

1979 Term

No. _____

ARLIE B. THOMPSON, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Arlie B. Thompson, respectfully prays that a Writ of Certiorari issue to review the Final Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 27, 1979 affirming Petitioner's conviction in the United States District Court for the Eastern District of Kentucky.

DECISION BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported. The Judgment of the United States District Court was not officially reported. A copy of the Opinion of the Sixth Circuit is printed as an appendix hereto.

JURISDICTION

This is a Petition seeking review of the Order and Judgment of the United States Court of Appeals for the Sixth Circuit entered on September 27, 1979 affirming the conviction of Arlie B. Thompson in the United States District Court for the Eastern District of Kentucky. Petition for Rehearing was denied on November 13, 1979. Jurisdiction to review this action on Writ of Certiorari is granted by 28 *USC* §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is prejudicial error for the Court to admonish the jury in a conspiracy trial that testimony of a government witness regarding out-of-court statements of an alleged co-conspirator may not be used against the Defendant until such time as the Court or the jury determines that there has been a prima facie showing of the existence of a conspiracy between the declarant and the Defendant, and to thereafter during the course of the evidence announce to the jury the withdrawal of that admonition thereby informing the jury that it is the opinion of the Court that a prima facie showing of the existence of a conspiracy has been made.

2. Whether it was error for the United States Court of Appeals for the Sixth Circuit to hold that in determining whether the government has made a prima facie showing of the existence of a conspiracy between the Defendant and an alleged co-conspirator for purpose of admission of the co-conspirator's hear-

say statement against the Defendant, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, the Trial Court may consider the hearsay statements themselves.

PROVISIONS OF FEDERAL RULES OF EVIDENCE INVOLVED

Petitioner bases his request for relief upon the following sections of the Federal Rules of Evidence:

Fed. R. Evid. 104(a), which reads as follows:

> "(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

Fed. R. Evid. 801(d), which reads as follows:

> "(d) Statements which are not hearsay. A statement is not hearsay if—
>
> (1) Prior to statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive, or (C) one of

identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

(A) Proceedings.

This action originated upon an indictment returned by a Federal Grand Jury in the Eastern District of Kentucky charging the Petitioner with violation of 18 *USC* 1951 and 18 *USC* 1952 in that he conspired to and did extort certain sums of money from Riverside Coal Company. He was convicted after trial by jury in the United States District Court for the Eastern District of Kentucky, and sentenced to two to three years of imprisonment to be served concurrently, and one five year term to be served consecutively, and a fine of $5,000.00. The five year term and fine were suspended.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of conviction on September 27, 1979. Petition for Rehearing was denied on November 13, 1979. It is from this Judgment that relief is now sought.

(B) Statement of Facts.

The Petitioner, Arlie B. Thompson, a member of the fiscal court of Lawrence County, Kentucky, a court which handles the county's financial affairs, is charged under 18 *USC* 1951 and 18 *USC* 1952 with one count of conspiring to extort money under color of law from the Riverside Coal Company in Lawrence County, Kentucky; one count of obtaining Twelve Hundred ($1200) Dollars; and one count of extorting the sum of Thirteen Hundred One ($1301) Dollars by extortion under color of law from the Riverside Coal Company. T.R., pp. 149-154. The Lawrence County Fiscal Court is not a law enforcement agency. T.R., p. 717.

The co-defendant, Charles Vinson, Sheriff of Lawrence County, Kentucky, and the Jailer of Lawrence County, Kentucky, unindicted co-conspirator Lindsey "Bo" Davis, in April, 1978, designed a scheme whereby they plotted to procure large sums of money by charging coal companies for the right to truck coal through Lawrence County, Kentucky. These two conspirators agreed to divide the money between themselves. Unless the money was paid to Vinson and Davis, it was divulged by the evidence, the Sheriff's department would begin to stop the trucks and give them citations for alleged violations of law. The threat of such official action was the leverage by which Sheriff Vinson

and Jailer Davis would extort the monies from the coal haulers. T.R., pp. 375-390.

Whether Davis legally withdrew from the scheme is not clear. He apparently was given immunity in exchange for his cooperation with the government. His grand jury testimony, read by the Court *in camera* and filed as an exhibit, or his testimony at trial, in no way incriminated Petitioner, Thompson.

On April 6, 1978, Sheriff Vinson and Davis drove in the Sheriff's car to the offices of Riverside Coal Company in Proctorville, Ohio, where the Sheriff contacted Riverside's Vice-President, James Williamson. At that time, Sheriff Vinson proposed that for the privilege of hauling coal through Lawrence County, Kentucky, Riverside would be required to pay a sum of money per ton to Sheriff Vinson. No specific agreement was reached on April 6, 1978. The coal company official was to get back in touch with Sheriff Vinson after the above mentioned conversation, which included the admonition from the Sheriff to Williamson—do not go to the law. T.R., pp. 200-208.

On April 11, 1978, the coal company's Vice-President called Sheriff Vinson and at Vinson's suggestion, a meeting at the Sheriff's office was arranged and they then traveled to the residence of Jailer Davis, where a discussion was held between Williamson and Vinson about the price Riverside would pay. T.R., pp. 211-214. Shortly after this conversation, on the same day, the unindicted co-conspirator, "Bo" Davis, approached James Williamson and stated that he would have nothing more to do with the extortion plot. T.R., pp. 215, 238, 243, 395 and 398.

On April 24, 1978, Mr. Williamson called Sheriff Vinson for the purpose of arranging a time and location for making the initial payoff. On May 5, 1978, pursuant to Sheriff Vinson's instructions, Williamson went to the shopping center in Ceredo, West Virginia, to meet a man whom Vinson said would be identifiable by his red suspenders; however, no one appeared wearing red suspenders. T.R., pp. 215-216.

On May 10, 1978, Sheriff Vinson again traveled to the Riverside Coal facility in Proctorville, Ohio, at which time Williamson advised Vinson of the fact that someone in Vinson's office named Dianne, had told the coal company executive to meet a man in the red suspenders on May 5, 1978, and that Williamson complied with the directions but that the alleged Sheriff's man in red suspenders did not appear. Vinson set up a meeting on May 12, 1978, between 4:00 p.m. and 5:00 p.m., with a man in red suspenders. At no time prior to May 12, 1978 was the name of Arlie B. Thompson mentioned. T.R., pp. 253-254, 551.

On May 12, 1978, Ronald Anderson, a Special Agent with the Federal Bureau of Investigation posing as an official of the Riverside Coal Company, went to the shopping center in Ceredo, West Virginia, for the purpose of delivering a package to a man the Sheriff described as wearing red suspenders. On May 12, 1978, Petitioner, Arlie B. Thompson, an ironworker, appeared at the shopping center wearing red suspenders, which were made by the wife of a fellow construction worker. Mr. Thompson testified that ironworkers wear suspenders to hold up their heavy tool belts.

The red suspenders were a type of warning of his presence in dangerous work situations. Arlie B. Thompson was employed as an ironworker approximately three to five miles from the shopping center, and had been asked by Vinson to go to the shopping center after work to pick up a package from a man to whom he was selling his coal and bring the money back to Louisa on his way home from work. T.R., pp. 255-257. The shopping center is about 35-40 miles from Louisa.

The conversation between Petitioner, Thompson, and F. B. I. Agent, Anderson, on May 12, 1978, was recorded by a body recording device worn by the agent. Nothing extraordinary can be elicited from the recording which has many inaudible parts. The agent gave Petitioner, Thompson, an envelope which the evidence on trial showed contained Twelve Hundred ($1200) Dollars. T.R., pp. 467-477. Thompson told Agent Anderson that he was supposed to "meet somebody." T.R., p. 544.

On May 30, 1978, Sheriff Vinson, or someone for the Sheriff, again called Williamson to try to get a Four Thousand ($4000) Dollar advance in payments. T.R., p. 262. On June 1, 1978, Williamson called the Sheriff in a recorded conversation and another meeting was arranged for June 6, 1978, at the shopping plaza at the same time. T.R., pp. 264-265. Petitioner's work day as an ironworker usually ceased at 3:30 p.m. T.R., p. 721.

On June 6, 1978, Agent Anderson, again posing as an official of the Riverside Coal Company, appeared at the Ceredo Shopping Plaza to deliver another package to the man whom he had previously paid the Twelve Hundred ($1200) Dollars on May 12, 1978. The Petitioner again appeared dressed in his work clothes as usual. T.R., pp. 492-497.

On June 6, 1978, after the Thirteen Hundred One ($1301) Dollars was paid, agents of the Federal Bureau of Investigation followed the Petitioner, Arlie B. Thompson, who drove to Louisa, Kentucky with the admitted intention of delivering the unopened envelope to Sheriff Vinson. On the second occasion, Petitioner, Thompson, was arrested by agents of the F. B. I. before he could deliver the envelope to Sheriff Vinson. Vinson denied any knowledge of Thompson's delivering any envelope. T.R., pp. 499-500, 593-598, 929 and 993. The envelope, marked "Sheriff Charlie Vinson," was sealed. T.R., pp. 541 and 543.

The meeting between Arlie B. Thompson and Agent Anderson on June 6, 1978, was also recorded by the use of a body recorder and again nothing of any direct incriminating nature can be elicited from the conversation except that the coal business in Lawrence County, Kentucky, was discussed along with several other generalities or figures of speech, none of which considered singly or totally, independently of the overt and brazen acts of Sheriff Vinson, indicates any criminal intent on the part of the Petitioner, Arlie B. Thompson. Agent Anderson and Thompson discussed generalities ranging from a bridge, the coal industry, to in the words of Agent Anderson, "just trying to make conversation." T.R., pp. 548-550.

Herein it is argued that the portion of the tapes which are intelligible are as consistent with the premise that Petitioner, Thompson, was trying to help the Sheriff sell his coal as that he was a co-conspirator in a federal crime.

The only evidence directly asserting a relationship between Thompson and the extortion conspiracy is the hearsay statements of a co-conspirator, Vinson, as related by the government's principal witness, Williamson. He stated in effect that Vinson told him that Thompson was in on the conspiracy replacing Davis. T.R., pp. 253-255.

REASONS FOR GRANTING THE WRIT

I. The Decision of the United States Court of Appeals for the Sixth Circuit That the Communication of the Court to the Jury That the Court Had Made a Finding That There Existed a Prima Facie Showing of the Existence of a Conspiracy Between the Defendant and His Co-Defendant Was Not Prejudicial to the Defendant Raises *Serious* and Important Questions of Federal Constitutional Law That Has Not Been and Should Be Decided by This Court.

At the trial of this case, the Defendants, Thompson and Vinson, were antagonistic toward each other both in the nature of their defenses as well as personally. The entire defense of Thompson was premised upon the contention that while he did receive two payments of money, which he subsequently delivered to Vinson, he did so completely without knowledge of the reasons for the payments, thinking them to be payments for coal sold by Vinson.

During the course of the trial, the government's witnesses testified to several statements allegedly made by Vinson regarding the role of Thompson. These statements are admissible as to Thompson only insofar as they fall within the so-called co-conspirator exception to the hearsay rule, Rule 801(d)(2)(E) of the Federal Rules of Evidence. Prior to admitting them as to Thompson, the statements of Vinson must first meet the test set forth in *United States* v. *Enright,* 579 F. 2d 980 (6th Cir. 1978). Specifically, the Court must determine prior to admission of the co-conspirator statements that by a preponderance of the evidence, there exists a conspiracy between the co-conspirator and the defendant against whom the hearsay is to be admitted.

In this case, the crucial error committed by the Trial Court was in the following exchanges:

> "Q. What happened after you had that conversation with Mr. Vinson?
>
> A. He said that he knew—and then I also about this time in the conversation confronted him with the fact that Bo Davis had come to me, had thrown a lot of confusion into the thing about how we was going to handle the payoff and he told me he was washing his hands of it. And he said, 'Ya, the son-of-a-bitch came and told me the same thing too.' And he said, 'That doesn't make any difference, though, because the man that I've got to replace him is a better man than he is and he will do a better job and everything.' And then he told me it would be Arlie B. Thompson.

Mr. Creech: We object, your Honor, and move for an instruction.

The Court: Overruled.

Q. Go ahead.

The Court: I will give this instruction. That will not be considered by you, ladies and gentlemen, as any evidence against the defendant Thompson until you are satisfied or the Court makes a ruling of a prima facie case of conspiracy. You will only use the evidence of a witness who was present in a conversation against the person who was present not against any other person. Let's proceed.

Q. Go ahead, Mr. Williamson. What else, if any, conversation did you have with Mr. Vinson on that date?

A. He said that however, this would be the way that he would be dressed and that he seemed to be puzzled on who had made or informed the girl by the name of Dianne to make the telephone call.

Mr. Creech: Objection and make a request for an instruction.

The Court: The same instruction, ladies and gentlemen. Until you are satisfied that there is some evidence establishing that the defendant Thompson was a part of a general scheme or conspiracy, nothing that the defendant Vinson, if you believe this witness, says about him can be used against him. After you believe a conspiracy exists, however, then any statement made by anybody can be used against any member of that conspiracy. But I will get to that later on in the instructions.

Q. Was there any further discussion between you and Sheriff Vinson on that day about any additional meetings?

A. Yes, sir. He said that there was no problem, that that sounded like a good plan to him and that we would just go ahead and set it up right there; that in fact we would meet in the same place at the Ceredo-Kenova shopping center in front of the liquor store on the 12th.

Q. May the 12th?

A. On May the 12th, yes, sir. And that the payoff would be handled and that the man in the red suspenders would be there.

Mr. Creech: Objection and move for instruction.

The Court: Same admonition about the defendant Thompson, ladies and gentlemen.

Q. At that time did he tell you that the man in the red suspenders would be who would be at the shopping center on May the 12th?

A. He told me in that conversation that it would be Arlie B. Thompson.

Mr. Creech: Objection. Admonition, please.

The Court: Same admonition, ladies and gentlemen."

The court was incorrect in its admonition in stating to the jury that it was the role of the jury to determine when sufficient showing of conspiracy had been made to permit admission of the hearsay. However, the greatest error was in ever communicating the nature of the test at all to the jury. If there is one point upon which the circuits are in agreement with respect to the application of Rule 801(d)(2)(E), it is that the question of when and whether a co-conspirator's statement is admissible is one for the court, pursuant to Fed. R. Evid. 104(a). *United States* v.

James, 590 F. 2d 575 (5th Cir. 1979); *United States* v. *Santiago,* 582 F. 2d 1128 (7th Cir. 1978); *United States* v. *Bell,* 573 F. 2d 1040 (8th Cir. 1978); *United States* v. *Martorano,* 557 F. 2d 1 (1st Cir. 1977); *United States* v. *Petrozziello,* 548 F. 2d 20 (1st Cir. 1977); *United States* v. *Enright,* 579 F. 2d 980 (6th Cir. 1978).

Later in the testimony at the request of the United States and over the express objection of counsel for both defendants, the Court made the following statement to the jury:

> "Very well, ladies and gentlemen, before we recall the witness for cross-examination, let me advise you that the admonition that I have given you earlier in the case about not considering certain testimony as to the defendant Thompson is now withdrawn." T.E., p. 534.

This statement has no other effect than to inform the jury that the Court has determined that the preponderance of the evidence supports a finding of a conspiracy between Vinson and Thompson.

The Circuit Court disposed of this error on the part of the Trial Court by stating that it was not prejudicial and at any rate was cured by the instructions. In essence, the Court's position is that because the Trial Judge did not expressly convey his decision to the jury when he withdrew the admonition it had little impact upon the jury. This position is premised upon the theory, apparently, that jurors are unable to make the simple inference required to understand why the

Court is withdrawing the admonition, yet the Court, in the same breath, attributes to the jury sufficient understanding to state that the Court's error was cured by its instructions.

Where the Trial Judge conveys to the jury that he has made a preliminary finding with respect to the factual existence of an element of the offense for which the defendant is on trial, he effectively destroys the right of the defendant to a fair and impartial trial by an impartial jury.

II. The Holding of the United States Court of Appeals for the Sixth Circuit That in Determining, Pursuant to Fed. A. Evid. 104(a), Whether the Factual Basis Has Been Established for Admission of a Co-Conspirator's Out-of-Court Statement Against the Defendant Pursuant to Fed. R. Evid. 801(d)(2)(E) the Trial Court May Consider as Evidence the Hearsay Statements Themselves, Is in Direct Conflict With the Decisions of Other Courts of Appeals on the Same Matter, and Is in Direct Conflict with Prior Decisions of This Court.

In the present case, the Sixth Circuit Court of Appeals has held that:

> "Finally, we believe that whatever procedure a District Judge uses, the hearsay statements themselves may be considered by the Judge in deciding the preliminary question of admissibility."

The Circuit Court relies upon Fed. R. Evid. 104(a) as modifying the prior law in this respect. In effect, it is the announced position of the Sixth Circuit that Rule 104(a) expressly overrules the holding explicitly

set forth by this Court in *Glasser* v. *United States,* 315 U. S. 60 (1942) and *United States* v. *Nixon,* 418 U. S. 683 (1974), and is in direct conflict with the position of the Fifth Circuit Court of Appeals as announced in *United States* v. *James,* 590 F. 2d 575 (5th Cir. 1979).

In *Glasser,* this Court stated in reference to admissibility under the co-conspirator exception:

> "However, such declarations are admissible over the objection of the alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy." At page 74.

This Court spoke most forcefully on the question in *United States* v. *Nixon,* in which the unanimous court stated:

> "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, *by independent evidence,* of a conspiracy . . ." At page 701.

In footnote number 14 at page 701, the Court further expands the requirement of independent evidence:

> "As a preliminary matter, there must be substantial independent evidence of the conspiracy, at least enough to take the question to the jury . . ."

This Court made its forceful and unequivocal statements in *Nixon,* in 1974, only one year prior to the effective date of Rule 104(a), and Petitioner submits

that the Rule does not serve to effectively overrule the Court's position.

The test in the Fifth Circuit is currently in conformity with the decisions of this Court in *Glasser* and *Nixon* and directly opposite to the position adopted by the Sixth Circuit in this case, and to the First Circuit in *United States* v. *Martorano,* 557 F. 2d 1 (1st Cir. 1977), and in *United States* v. *Petrozziello,* 548 F. 2d 20 (1st Cir. 1977).

In *Martorano,* the Court goes so far in construing Rule 104(a) as to state, "We believe the new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists."

The most persuasive examination of the relationship of Rule 104(a) to Rule 801(d)(2)(E) is found in the Fifth Circuit's examination of the topic in *James,* wherein the Court states:

> "Although Rule 104(a) provides that the Court is not bound by the Rules of Evidence except those with respect to privileges we do not construe this language as permitting the court to rely upon the very statement whose admissibility is at issue." At page 581.

The Sixth Circuit's position as announced in the present case simply defies all reason since the very purpose of the guidelines set forth in Rule 804(d)(2)(E) is to outline the factors which when present raise the hearsay statement to a sufficient level of trustworthi-

ness to allow its submission to a jury. The existence of a conspiracy is the very factor which makes the hearsay statement admissible to permit it to be used as a foundation for itself is to abrogate the entire thrust of Rule 804(d)(2)(E).

The present state of the law relative to the co-conspirator exception to the hearsay rule is one of confusion. The Circuits have adopted diametrically opposing positions and the Sixth Circuit has in this case joined the First Circuit in its belief that Rule 104(a) of the Federal Rules of Evidence has expressly overruled both *Glasser* and *Nixon*. This court should grant a Writ so that this conflict may be resolved.

CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Certiorari to review the Judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

No. 78-5406
No. 78-5412

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES VINSON (78-5406),
ARLIE B. THOMPSON (78-5412),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed September 27, 1979

Before: EDWARDS, Chief Judge; KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. After a jury trial in the United States District Court for the Eastern District of Kentucky, Vinson, Sheriff of Lawrence County, and Thompson, a county magistrate, were convicted of extorting money from a coal company and of conspiring to do so. 18 U.S.C. § 1951 (1976). We affirm the defendants' convictions. The major issue on appeal is whether the District Judge followed proper procedures governing admission of co-conspirator hearsay evidence. We address questions left unanswered by our recent decision in *United States* v. *Enright*, 579 F. 2d 980 (6th Cir. 1978), and establish guidelines for administering the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E).

I.

During the government's case-in-chief, the District Court admitted testimony describing out-of-court statements of Sheriff Vinson which tended to incriminate Magistrate Thompson in both the conspiracy and the substantive offenses. An officer of the coal company who was the target of the extortion plan testified that the Sheriff told him that the Magistrate was his agent in the extortion scheme and would pick up the extortion payments. Upon timely objection, the District Judge instructed the jury as follows:

> That [hearsay] will not be considered by you, ladies and gentlemen, as any evidence against [the Magistrate] until you are satisfied or the Court makes a ruling of a prima facie case of conspiracy.

Further along in the government's case, the District Judge make a preliminary finding that the government had proved a conspiracy involving the Sheriff and Magistrate by a preponderance of the evidence. He then ruled that the out-of-court statements of the Sheriff, made in the course of and in furtherance of the conspiracy, could be used as evidence against the Magistrate. He instructed the jury:

> Ladies and gentlemen . . . let me advise you that the admonition that I have given you earlier in the case about not considering certain testimony as to [the Magistrate] is now withdrawn.

Both defendants objected to the judge's second statement on the ground that it amounted to an improper comment on the sufficiency of the evidence. Although we believe that the judge should have made neither statement, we find that no prejudice resulted to defendants. The government's proof of the conspiracy as well as of the substantive offense rested on strong non-hearsay evidence

which showed that the Sheriff, the Magistrate and an unindicted third person conspired to and, in fact, did extort money from the coal company. Sheriff Vinson was the principal in the scheme, and the Magistrate and the third person were his agents. The three threatened to harass the coal company's trucks which operated on county roads unless extortion payments were made. Two such payments were made before authorities apprehended the defendants. There was relatively little co-conspirator hearsay admitted both before and after the District Judge made his preliminary finding, and the jury had abundant, non-hearsay evidence on which to base its verdict. Moreover, any confusion which might have been caused by the trial judge's comments to the jury was cured by his final conspiracy instruction in which the elements of a criminal conspiracy and the government's burden of proof were clearly and correctly stated.

In *Enright* we held that, before the government can take advantage of the co-conspirator exception to the hearsay rule, it must show by a preponderance of the evidence (1) that a conspiracy existed, (2) that the defendant against whom the hearsay is offered was a member of the conspiracy, and (3) that the hearsay statement was made in the course and in furtherance of the conspiracy. We also held that this preliminary finding is the sole province of the trial judge. Fed. R. Evid. 104(a). In *Enright,* however, we did not decide whether, before the judge has made his finding on the preliminary question, he may admit the hearsay subject to connection later in the trial, as did the trial judge here. We also did not decide whether the trial judge may consider the hearsay itself in making his preliminary finding.

A trial judge must have considerable discretion in controlling the mode and order of proof at trial[1] and his rul-

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[1]Fed. R. Evid. 611(a). *See also* United States v. James, 590 F. 2d 575, 588 (5th Cir. 1979) (*en banc*) (Tjoflat, J. concurring).

ings should not cause reversal of a criminal conviction unless they "affect substantial rights."[2] Thus, we do not believe that it is appropriate to set forth hard and fast procedures. Rather, we set forth alternative means for District Judges to structure conspiracy trials, that will allow the government to present its proof while at the same time protecting defendants from inadmissible hearsay evidence.

One acceptable method is the so-called "mini-hearing" in which the court, without a jury, hears the government's proof of conspiracy and makes the preliminary *Enright* finding.[3] If the hearsay is found admissible, the case, including co-conspirator hearsay, is presented to the jury. Although this procedure has been criticized as burdensome, time-consuming and uneconomic,[4] a trial judge, in the exercise of his discretion, may choose to order the proof in this manner if the circumstances warrant.

The judge may also require the government to meet its initial burden by producing the non-hearsay evidence of conspiracy first prior to making the *Enright* finding concerning the hearsay's admissibility. This procedure clearly avoids "the danger . . . of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes."[5]

The judge may also, as was done here, admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence. If this practice is followed, the court should stress to counsel that the statements are admitted subject to defendant's continuing

[2]Fed. R. Crim. P. 52(a).

[3]This procedure was adopted by a panel of the Fifth Circuit, *United States* v. *James*, 576 F. 2d 1121 (1978), and subsequently modified by an *en banc* court, 590 F. 2d 575 (1979).

[4]*See* the majority and concurring opinions in the Fifth Circuit's *en banc* decision in *United States* v. *James*, 590 F. 2d 575 (1979).

[5]United States v. Macklin, 573 F. 2d 1046, 1049 n. 3 (8th Cir.), *cert. denied* ___ U. S. ___, 99 S. Ct. 160 (1978).

objection and that the prosecution will be required to show by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the statements are hearsay was a participant and that the statement was made in the course and in furtherance thereof. At the conclusion of the government's case-in-chief, the court should rule on the defendant's hearsay objection. If the court finds that the government has met the burden of proof described in *Enright*, it should overrule the objection and let all the evidence, hearsay included, go to the jury, subject, of course, to instructions regarding the government's ultimate burden of proof beyond a reasonable doubt and the weight and credibility to be given to co-conspirators' statements. If, on the other hand, the court finds that the government has failed to carry its burden, it should, on defendant's motion, declare a mistrial unless convinced that a cautionary jury instruction would shield the defendant from prejudice.[6]

If the trial judge does choose to admit the hearsay (a) after the government has established the conspiracy by a preponderance at the trial, or (b) at a "mini-hearing," or (c) conditionally subject to connection, he should refrain from advising the jury of his findings that the government has satisfactorily proved the conspiracy. The judge should not describe to the jury the government's burden of proof on the preliminary question. Such an instruction can serve only to alert the jury that the judge has determined that a conspiracy involving the defendant has been proven by a preponderance of the evidence.[7] This may adversely affect

[6]United States v. James, 590 F. 2d at 581-83; United States v. Bell, 573 F. 2d 1040, 1044 (8th Cir. 1978); United States v. Geaney, 417 F. 2d 1116, 1120 (2d Cir. 1969), *cert. denied* 397 U. S. 1028 (1970).

[7]Herein lies the error that defendants claim was committed in the instant case. In fact, the District Judge did not state to the jury his opinion or findings on the conspiracy, but perhaps his finding could be inferred from his ruling.

the defendant's right to trial by jury. The judge's opinion is likely to influence strongly the opinion of individual jurors when they come to consider their verdict and judge the credibility of witnesses.

Finally, we believe that, whatever procedure a District Judge uses, the hearsay statements themselves may be considered by the judge in deciding the preliminary question of admissibility. The preliminary finding of conspiracy for purposes of the co-conspirator exception to the hearsay rule is a "question concerning . . . the admissibility of evidence" governed by Fed. R. Evid. 104(a), and we believe that the final sentence of Rule 104(a)—stating that the judge "is not bound by the rules of evidence"—modifies prior law to the contrary.[8] The fact that the judge may consider under Rule 104(a) hearsay evidence which the jury could not consider is an added reason the judge should refrain from advising the jury of his findings.

II.

We now turn to defendants' other claims:

1. Both defendants challenge the sufficiency of the evidence. The Sheriff argues that the testimony of the government's key witness, an executive of the coal company, was contradicted to such an extent as to render the verdict unsupportable. This key witness testified that the Sheriff came to see him, outlined the payoff scheme and sent the magistrate to collect the money. This testimony was most damaging, despite defense counsel's zealous attempts to rebut and impeach the witness. The fact that the jury chose to believe this witness and to disregard the Sheriff's

[8] *See* United States v. Enright, 579 F. 2d at 985 n. 4. There is a split of authority on this question. *Compare* United States v. James, 590 F. 2d at 592 (Tjoflat, J. concurring) and United States v. Martorano, 557 F. 2d 1, 12 (1st Cir. 1977), *cert. denied,* 435 U. S. 922 (1978) *with* United States v. James, 590 F. 2d at 581 (Clark, J. for *en banc* court) and United States v. Bell, 573 F. 2d at 1044.

attack on his credibility is no basis for reversal. The testimony was corroborated by other witnesses, and there was sufficient evidence from which the jury could find guilt beyond a reasonable doubt.

The evidence of the Magistrate's involvement in the conspiracy was also strong. A review of the record indicates that he twice collected extortion payments for the Sheriff from government agents acting undercover as coal company employees. The Magistrate made statements on at least two occasions which support an inference that he was aware that the payments were part of the extortion scheme. This evidence, as well as evidence of their association, was sufficient to support the verdict, and the jury was not required to accept the Magistrate's contrary explanation of events.

2. Both defendants claim to have been prejudiced by the District Judge's denial of severance. Fed. R. Crim. P. 14. The argument is that the Sheriff's and the Magistrate's defenses were mutually antagonistic in that each defendant sought to cast the blame on the other. Absent some indication that the antagonism between co-defendants misled or confused the jury, the mere fact that co-defendants attempt to blame each other does not compel severance. *United States* v. *Perez,* 489 F. 2d 51, 68 (5th Cir. 1973), *cert. denied,* 417 U. S. 945 (1974).

3. Both defendants argue that they were prejudiced by the government's delay in producing discoverable information. *See* Fed. R. Crim. P. 16. Specifically, defendants claim that pre-trial statements of government witness Davis, which tended to exculpate them, were not provided until it was too late for defense counsel to use them effectively. Assuming, *arguendo,* that Davis' statements were exculpatory, defendants were given sufficient opportunity to see and make use of the statements. The Magistrate obtained the statements before the trial began, and the

Sheriff obtained them during the government's direct examination of Davis. Indeed, the Sheriff's counsel made use of the statements during his cross-examination of the witness. At most, defendants have shown that they would have preferred to have obtained the statements earlier. But they have failed to show any government bad faith or prejudice resulting from the procedure that was actually followed.

4. The Sheriff claims that the District Court erred by refusing to instruct the jury to give less credence to witness Davis' testimony because he was a government informant. There is no evidence in the record to suggest that Davis was an informant, and, even if he had been, the court was not obliged to instruct the jury to this effect because his testimony was corroborated materially by other witnesses.[9] Moreover, the District Judge did instruct the jury to treat Davis' testimony with care because of evidence suggesting that he was an accomplice, and this had the same cautionary effect as if the judge had given the instruction the Sheriff requested.[10]

5. The Magistrate claims that he was prejudiced when the United States Attorney elicited on cross-examination an admission that he had two pistols in his possession at the time of his arrest. The District Court had previously indicated that the Magistrate's possession of handguns was irrelevant and had directed the prosecution not to inquire about the weapons. The prosecutor did not directly question the Magistrate about this subject, but the questions which elicited the admission were, arguably, an indirect attempt to circumvent the judge's admonition. We cannot be sure of the prosecutor's motive; but, taken in context, we do not believe the questions affected the verdict in any way.

[9]United States v. Garcia, 528 F. 2d 580 (5th Cir.), *cert. denied* 426 U. S. 952 (1976); United States v. Lee, 506 F. 2d 111 (D.C. Cir. 1974), *cert. denied* 421 U. S. 1002 (1975).

[10]*See generally* 2 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 490 (1969 & Supp. 1979).

6. The Sheriff argues that the District Court erred by allowing the jury to read transcripts of tape recordings while the tapes were being played in open court. Although it is the preferred practice that transcripts of tapes not be submitted to the jury unless there is a stipulation as to their accuracy,[11] we do not believe Vinson was prejudiced by the procedures followed in this case. The District Judge reviewed both the tapes and transcripts before they were presented to the jury. Defense counsel were given copies of the transcripts before their use at trial and an opportunity to point out discrepancies between the tapes and the transcripts. The jury was carefully advised that transcripts were only an aid and that the tapes were the substantive evidence, and only the tapes were allowed in the jury room.[12]

7. Vinson argues that the trial judge erred by permitting co-defendant Thompson to call witnesses to rebut evidence introduced by Vinson. After Thompson had rested his case, Vinson called a witness who testified that, on a certain date when Thompson claimed he had delivered money to Vinson, Vinson was, in fact, elsewhere. Since Vinson's proof of alibi followed the close of Thompson's case and came as a surprise to Thompson, the District Judge let Thompson put on proof to rebut Vinson's story and to rebuild Thompson as a witness. Vinson was allowed to cross-examine Thompson's rebuttal witnesses. Control of the order and method of presentation of evidence is left to the discretion of the trial judge. Fed. R. Evid. 611(a). The rebuttal testimony was relevant, and its presentation was not procedurally unfair to Vinson.

8. The Sheriff objected on hearsay grounds to the admission of two "payoff" envelopes bearing the name

[11]United States v. Smith, 537 F. 2d 862, 863 (6th Cir. 1976); United States v. Bryant, 480 F. 2d 785, 791 (2d Cir. 1973).

[12]*See* United States v. Rinn, 586 F. 2d 113, 117-18 (9th Cir. 1978), *cert. denied* ___ U. S. ___, 99 S. Ct. 2051 (1979).

"Sheriff Charles Vinson" and to the testimony of an undercover agent that the envelopes were so marked for the purpose of delivery to the Sheriff. The marked envelopes themselves were not hearsay because the three words were not introduced as a true statement of fact but merely served to identify "real" evidence, *i.e.*, the envelopes in which the money was delivered. The words had operative effect regardless of the meaning the declarant intended them to have. *See* Fed. R. Evid. 801(c). The agent's testimony describing the purpose for which the Sheriff's name was written did not describe or recite an out-of-court statement at all but rather was a statement made by the witness in order to explain a past event. *Id.* He testified as to his own purpose as a participant in the preparation and delivery of the envelopes. The reliability of this evidence did not depend on "the language, sincerity, memory, or perception" of a declarant not present and subject to cross-examination.[13] We do not believe, in any event, that Vinson was prejudiced by this testimony because other evidence in the record convincingly shows that the envelopes and their contents were intended for delivery to Vinson.

9. Finally, the Sheriff argues that the District Court erred by limiting defense counsel's cross-examination of Davis. The Sheriff's counsel attempted to question Davis about a past scheme in which Davis and a third party had considered bribing the Sheriff. The cross-examination was offered to impeach Davis' credibility as a government witness. Fed. R. Evid. 608(b). The trial judge refused to allow the cross-examination on the ground that it was not "probative of truthfulness or untruthfulness." *Id.* Although it is arguable that prior misconduct of this nature is indicative of the witness' moral turpitude and, therefore, probative of his disregard for truth and honesty, such de-

[13] *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 127, 149-62 (1956).

terminations under the rule are vested "in the discretion of the [trial] court." *Id.* We can find neither an abuse of discretion nor any significant harm to defendant. The question was remote on credibility and unrelated to the merits.

The judgments of conviction are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5412

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

ARLIE B. THOMPSON - - - *Defendant-Appellant*

ORDER DENYING PETITION FOR REHEARING—
Filed November 13, 1979

Before: EDWARDS, Chief Judge; KEITH and MERRITT, Circuit Judges.

No judge of the Court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk